

Skillshare International Workshop

Venue: Esibayeni Lodge

Date: 2-3rd May 2008

Purpose: The meeting was meant to teach and sensitize the chiefs on the constitution, its impact on their powers and what is expected of them. Also the meeting was meant to sensitize the chiefs on women's rights and its impact.

Presentation by Thembayena Dlamini
She presented on constitutionalism

Key issues highlighted

- ❖ Constitutions are not a new concept. Countries adopted constitutions as a foundation for the proper governing of society.
- ❖ Constitutions are the supreme laws of any country. If any law is inconsistent with any provision of the constitution that law is null and void as far as that inconsistency is concerned
- ❖ Constitutions lay out clearly the composition of government, the extent of government power, and how the separation of powers is going to be achieved, the conduct of elections and electioneering.
- ❖ Constitutions differ: some are written whilst others are not. The Swazi constitution is one of the written and the one for Britain falls on the unwritten ones.
- ❖ Modern constitutions contain clauses that were not catered for in previous constitutions: these clauses include the ones on protection of human rights, women's rights, protection of natural resources, etc.

Importance of having a constitution

- ❖ The constitution is the supreme law of the land. All laws of the land are subject to it.
- ❖ Issues of governance, citizenship, powers and responsibilities of the governors, rights and duties of the citizenry are spelt out clearly.
- ❖ The composition, function and role of traditional structures are also spelt out clearly.
- ❖ The constitutions jealously protect the rights of the people against ill treatment, exploitation and abuse. Those in government have a reciprocal obligation to rule in line with the constitution and respect the rights of the governed.

Preview of the constitution

- ❖ Swaziland is a unitary, sovereign, and democratic kingdom (Section 1(1)). People will have a say in the formation of government. Every Swazi has a right to vote at any election of members of parliament, bucopho, and indvuna yenkhundla.
- ❖ Group representation is not allowed in Swaziland (Section 79). Election candidates are elected based on their individual merit. Elections in Swaziland are conducted at Tinkhundla centers. Also, Swazis have a right to be heard through and represented by their own freely chosen representatives in the government of Swaziland (section 84 (1)). Also women and other marginalized groups have a right to equitable representation in Parliament and other public structures (section 84 (2)).
- ❖ Section 2- the constitution is the supreme law of Swaziland and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void. The King and iNgwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend this constitution (section 2(2)).
- ❖ The constitution also establishes the Election and Boundaries Commission to govern issues relating to holding of elections (section 90).
- ❖ The constitutions also cater for the formation of commissions. These commissions also include *inter alia* the Elections and Boundaries Commission (section 90), Commission on Human Rights and Public Administration (section 163), Judicial Service commission (section 159), and the Civil Service Commission (section 186)

Women's Rights

- ❖ The Constitution provides that if it appears after any general election at the first meeting of the House, that women parliamentarians constitute less than the minimum 30% standard of the total membership, the House shall elect four women in compliance with section 95(3).

Swazi Nation Land

- ❖ Chiefs in the name of the King shall administer Swazi Nation land. Every Swazi shall have equal access to land for normal domestic purposes, without regard to gender (section 211(2)). No person shall be deprived of land without the due process of the law.
 - The power to allocate Swazi Nation Land is vested with chiefs
 - A male can only be allocated land when he brings his wife along.
 - For a female, she must bring her father; alternatively her male son and she will be allocated land in the name of her son.
 - That land is only meant for domestic purposes.
 - Chiefs have the final say in the allocation of land.

- ❖ When a bill with issues touching on Swazi law and custom is introduced in the house of senate, the second reading of the bill shall not take place until it has been sent to the Council of chiefs (section 115(2) (a)).

Issues raised

- How old should the child be whom the woman uses for the allocation of land?
- What about those who had failed marriages yet they have no kids?

Human rights

- ❖ The constitution confers and protects human rights as spelt out in the Bill of rights (section 14-35). Human are born with human rights. Its important that human rights be written down and be understood by the populace. Human rights require respect for each other as human beings. They require reciprocal obligations. If any right is being or likely to be contravened the person affected may apply to the High Court for redress.

Conventions

- ❖ Conventions govern issues not limited to economy, culture, human rights, citizenship, voting, international relations, etc.
- ❖ Swaziland has ratified many conventions including The Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**), the Conventions Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, etc.
- ❖ The constitution takes cognizance of the ratified conventions especially on issues touching on women's rights-maternity leave, freedom of association, representation in parliament etc.
- ❖ The constitution also gives women rights not to undergo or uphold any custom, which they are consciously opposed to it (section 28(3)).

Children's' Rights

- ❖ A child has a right to be protected from engaging in work that constitutes a threat to his/her education or development as a child, has a right to be properly cared for, is entitled to a reasonable provision out of the estate of his/her parents, and to free primary education (section 29 (1-7)).
- ❖ The constitution also protects persons with disabilities (section 30).
- ❖ The law provides for the chastisement of children but it should be reasonable.

Property rights of spouses

- ❖ A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the deceased had left a will or not and whether the spouses were married by civil or customary rites. Parliament shall enact legislation

regulating the property rights of spouses including common law husband and wife (section 34).

People are free to enjoy human rights within the confines of the law.

Amendment of the Constitution

- ❖ The constitution can only be amended in through the channels provided by the constitution as provided in sections 245-247.

Observations

- Participants wanted to know what was expected of them after being taught on human rights.
- The arrival of human rights has brought organization, which are advocating for human rights. These has encouraged children and women to report their husbands for prosecution purposes
- The idea of equality means that the man no longer has the last say in all matters. This has led to children losing respect of their fathers because their mothers will protect them from the father. Besides, enforcing corporal punishment on the kids is impossible as there is the continual threat of being prosecuted for violating their rights.
- Besides, does the equality mean that women can now men's job? If so, why does the training differ when it comes to allocation of jobs especially within the army and training? No women soldiers are patrolling the country's borders...
- Women now freely refuse sex and if you persist you may be charged with raping your own wife.
- With the coming of human rights there are many women who are not married
- Women are advocating for equal representation in parliament and government-a country led by a woman is doomed for destruction.
- Women are complaining of not having their rights respected-In Swazi culture when a woman gets married she assumes her full rights-the home is called by her surname. So what rights are they complaining about?
- Do women want to assume man's status by advocating for equality? Women now spend many days away from home? Are these the rights they are advocating for?
- Human rights have now become defensive shields for doing wrong things. Children misbehave and wave their rights as shields against being disciplined.
- When parents are in conflict it's only the woman who wields her right against being bashed by her husband/men.
- How do you measure the punishment on a child when you want it to be reasonable?
- When human rights came aboard they were misconceived and misused

CEDAW

- ❖ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is often described as an international bill of rights for women. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.
- ❖ The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

State Obligations

- ❖ By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:
 - To incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
 - To establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
 - To ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.
 - The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -- including the right to vote and to stand for election - - as well as education, health and employment. The Convention is the only human rights treaty, which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children.
 - By ratifying these convention states parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.
 - This implies that women's cases in courts should be deliberated upon without discrimination. These include cases tried by the traditional structures where women were previously not allowed to sit with the rest of the community if they were in mourning.
 - Family education will help in sensitizing the family members that the issue of raising kids is not only meant for women only but it's a family affair.
 - With rural women it is expected that the government will bring closer all services. These include even availing opportunities for self-development.
 - The betrothal and the marriage of a child shall have no legal effect, and all necessary steps shall be taken to specify a minimum age for marriage, and to make the registration in an official registry compulsory (section 16(2)).

- ❖ States Parties shall, within one year, submit to the Secretary-General of the United Nations a report on the legislative, judicial, administrative or other measures, which they have adopted to give effect to the provisions of the Convention and on the progress made in this respect (section 18 (1)(a), (b)).
- ❖ The submission of reports shall then be done at least every four years and further whenever the Committee so requests. Reports may indicate factors and difficulties affecting the degree of fulfillments of obligations under the present Convention (section 18 (2)).

Legal remedies

- ❖ All aggrieved and affected parties must petition the High court for their rights. After exhausting local remedies an aggrieved party may then pursue the International legal remedies at his/her disposal.

Swazi Constitution on Women's rights

- ❖ The Swazi constitution provides for the protection of women's rights in areas such as the provision on equality before the law (section 20(1), rights and protection of family (section 27), rights and freedom of women (section 28 (1), property rights of spouses (section 34), to mention but a few.
- ❖ The Swazi constitution is in line with the Convention only as far as the above rights are mentioned.
- ❖ Section 21 (2) specifically categorizes the basis of which persons shall not be discriminated against. However, the categories of sex and marital status have been omitted from the list yet the existing laws and practices in the country indicate that they are usually the ones on the basis of which women are negatively discriminated against.
- ❖ Also, section 28 (3) provides that women shall not be compelled to undergo a custom that she is consciously opposed to. This is an unprecedented departure from usual practice and dictates of customary law by which women have been socially proscribed and dictates of customary law by which women have been socially proscribed and very often with detrimental effect on their welfare. These are customs such as mourning, kungenwa, and forced/unconsented marriages through kutekwa custom. This provision does not offer full protection to women.
- ❖ Section 27 (2) falls short by failing to prescribe marriageable age. Without a stipulated age girls may continue to find themselves married when they cannot legally give consent to their acts.
- ❖ Section 43 (1) on citizenship does not do any good. Women are not accorded the same status as envisaged by the Convention. Section 86 tries to remedy this situation although this is not enough.

Objections/Questions raised

- ❖ Which rights are women complaining about being deprived because where they have become heads of many households, especially where the men are no more?
- ❖ Are the rights under discussion those possessed by rural or urban women?
- ❖ Who do they consult and to whom are those who sign the agreements accountable to?
- ❖ Where do we draw the line between the rights of married and unmarried, urban or rural woman?
- ❖ What role does culture have to play in the idea of rights?
- ❖ A traditional wedded woman has her full rights if she has a house, cattle, fields and children. Which rights is she deprived of then?
- ❖ Human rights existed since time immemorial. What is it then when women claim that they have no rights?
- ❖ The section on equality is misleading as only men pay dowry, not women.
- ❖ Why the 30% exception on women parliamentarians? If equal then women should equal campaign like men. This should be like wise in police and army recruitment centers.
- ❖ Human rights are one sided. They overprotect the side of women against that of men.
- ❖ God placed men as the head of a family. Are we disputing God's rationale in making women heads too?
- ❖ When and what has influenced women to claim that their rights are being taken away from them?

Gloria Dlamini-Dube

- ❖ Make Dube is serving as a member of the inner council of Mpolonjeni, in the outskirts of Mbabane. She hared on her good and bad experiences as a member of her community inner council
- ❖ She thanked chiefs on their good reception when the program was being conducted in their respective communities.
- ❖ She thanked chiefs for their good attendance and encouraged them to bring along their wives for such meetings. As the agenda of the meeting was focused on the constitution and women's rights, it was important that they attend so that they may easily cooperate with the chiefs in pursuit for development.
- ❖ Since women bear the future chief its pivotal that they abreast with current issues so that they may be able to raise the chief-to-be.
- ❖ Women know the things in communities and they should not be left behind when discussing issues of development. Although it has not been easy for women to freely work in communities, chiefs are encouraged to include more women in community issues.
- ❖ Community servants like chiefs and other committees pay allegiance to the king. As community servants they should not be seen to be going against the will of his majesty.

- ❖ Chiefs should always be informed of new agreements signed by the government so that they may apply them accordingly in their different communities. If chiefs labour in ignorance they would find themselves working against the King's word.
- ❖ One such agreement is the one that SADC countries signed that requires that women issues should be dealt with in the same manner like other issues, and that women should be involved in every sphere of life. Women should be involved in socio-economic, political and development issues
- ❖ The agreements that advocate for women rights are meant to hasten women's development and involvement in every sphere of life so that men and women can be at the same level on all issues

Issues/objections/questions raised

- The present crop of chiefs was raised by women who were not attending women as modern women do. Modern women only talk about gender and equality (positions).
- If you don't invite the women for workshops how should then chiefs include them in development schemes?
- It's wrong to send a woman to a meeting if the man is available. Women are man to procreate, raise kids, and teach them ways of life. Only the chief is mandated to attend meetings.
- What is the sphere of human rights? Do they go as far as the bedroom, home, workplace, and community?

Challenges faced at community level

- ❖ Applications of the constitution-despite the adoption of the constitution chiefs are not keen to apply it, especially in the sphere of women's rights. It's difficult for ordinary citizens to assert their rights fully in the communities.
- ❖ The Constitution and Conventions have improved the status of women but in the community the old inferior status of women still holds.
- ❖ In most communities women are still expected to mourn their departed husbands by wearing the black gowns. This despite the fact that the constitution has emancipated women from upholding customs that they are consciously opposed to. Even if the families can engage in discussions the husband's family will have the last say, not the woman affected.
- ❖ Some communities have evicted their residents because they did not mourn for their husbands.

Musa Hlophe-Elections and Electioneering

- ❖ Chief as community leaders should always be a step ahead with knowledge.

- ❖ Chiefs should know the constitutions and be able to apply it accordingly. They should then enlighten their communities on their rights and responsibilities.
- ❖ As footstools of the King chiefs should exemplary by conduct and in everything they do.

Elections

Elections are said to be free and fair if the electoral process is one where fundamental human rights and freedoms are respected, including:

- ❖ Freedom of speech and expression by electors, parties, candidates and the media;
- ❖ Freedom of association; that is, freedom to form organizations such as political parties and NGOs;
- ❖ Freedom of assembly, to hold political rallies and to campaign;
- ❖ Freedom of access to and by electors to transmit and receive political and electoral information messages;
- ❖ Freedom to register as an elector, a party or a candidate;
- ❖ Freedom from violence, intimidation or coercion;
- ❖ Freedom of access to the polls by electors, party agents and accredited observers;
- ❖ Freedom to exercise the franchise in secret, and
- ❖ Freedom to question, challenge and register complaints or objections without negative repercussions.

For elections to be fair 'playing field' should be reasonably level and accessible to all electors, parties and candidates, and includes:

- ❖ An independent, non-partisan electoral organization to administer the process;
- ❖ Guaranteed rights and protection through the constitution and electoral legislation and regulations;
- ❖ Equitable representation of electors provided through the legislation;
- ❖ Clearly defined universal suffrage and secrecy of the vote;
- ❖ Equitable and balanced reporting by the media;
- ❖ Equitable access to financial and material resources for party and candidate campaigning;
- ❖ Equitable opportunities for the electorate to receive political and voter information;
- ❖ Accessible polling places;
- ❖ Equitable treatment of electors, candidates and parties by elections officials, the government, the police, the military and the judiciary;
- ❖ An open and transparent ballot counting process, and
- ❖ Election process not disrupted by violence, intimidations or coercion.

Laws relating to hosting of elections in Swaziland

- ❖ Section 2 (1) of the constitution places it as the supreme law of Swaziland. It does not do away with other laws but where they are inconsistent with the constitution they shall be held void insofar as they are inconsistent.
- ❖ S 268 (1) states that the existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.
- ❖ The expression “existing law” means the written and unwritten law including customary law of Swaziland...
- ❖ Therefore when there is a clash between the constitution and existing laws the constitution must be held as paramount. Also when there is a clash between Swazi Law and Custom – the Constitution must also be held paramount.
- ❖ This means that insofar as the registration of voters applies that the 1992 Registration of Voters Order remains in place but it must be interpreted very carefully. It has to be read with the order in one hand and the constitution in the other so that order can be properly interpreted.
- ❖ Sections 84-92 of the Constitution govern the holding of elections.
- ❖ The following persons are eligible to vote
 - Anyone who is over 18 years at the date of registration,
 - Anyone who is a citizen **or** ‘ordinarily resident’ in Swaziland, and who is
 - Not disqualified by reason of insanity, imprisoned for life or facing the death penalty, guilty of election fraud.
- ❖ The decisions on who is a citizen require knowledge of the constitution (sections 40-55). Citizenship can be acquired through birth, registration, adoption, marriage (women only).

Discrimination at Registration Centers

- ❖ When the voter registration takes place at an Umphakatsi or other official residence great care must be taken to respect the right of the individual to register in spite of contrary indications of Swazi Law and Custom. E.g. widows and the disabled must be able to be registered in exactly the same manner as any other eligible citizen.

Requirement for voting

- ❖ It seems that the 1992 requirement for the three-month residence or keeping a home in an inkhundla is impliedly repealed, as it is not mentioned as one of the qualifying criteria. This implies that a citizen can choose which inkhundla he wishes to vote in irrespective of any local connection but a non-citizen cannot – he must have been ordinarily resident there for at least five years.
- ❖ The constitution provides that sixty-six (66) constituencies should partake in the general elections. The reality is that only fifty-five (55) constituencies will partake in the current elections.

The role of the Election and Boundaries Commission

- ❖ The role of the Election and Boundaries Commission is to oversee and supervise the voter registration process. This means to ensure that it is done correctly.
- ❖ It is the role of the government to draft legislation in conjunction with representatives of voters, experts in election management, and it is for Parliament to pass the bill into law that will set out the method of registration and voting that the Commission will oversee.
- ❖ This appeared to be the case at hand when Prince David put forward two bills to parliament regarding voter registration and administration of elections. These had to be withdrawn and under Parliamentary Standing Orders they may not be submitted in the same session of parliament. This means that either parliamentary standing orders will have to be set aside or that the current muddle will have to stand.
- ❖ The International protocols that Swaziland has ratified require that the EBC should be an independent body. Independence in administrative law is a very technical area and one that has been the subject of many court cases. It does not mean that an independent body can do exactly as it wishes without consequence or accountability.
- ❖ In electoral law terms it means that it will act fairly in relation to all interested parties to an election without consistently favouring one person or side or view, over another. It must be and be seen to be free from the influence of interested parties or have the potential for bias.

The normal test for independence is to look at, *inter alia*,

- The manner of appointment of its members-was it open? Was it on merit? What were the criteria used, do these people have them?
- Their term of office- is it long enough so that they can operate without fear of removal?
- The existence of guarantees against outside pressures
- The question whether the body presents an appearance of independence

The only guarantee against outside pressures is from s90 (13) that states that the commission shall not be under the control of any other body. On the day that it was set up Prince David gave instructions as to which parts of the constitution it was to ignore

The role of the chiefs

- ❖ Section 233 of the constitution shows that the king rules through the chiefs and regards them as his footstools. They are to be the father of the community, symbols of unity and not to take part in partisan politics.

Under the Swazi Administration Order 1988

- Chiefs may be appointed and dismissed at the king's pleasure.
- Terms and conditions of service are determined by the King

- Chiefs must carry out any instructions given to him by the Ngwenyama
- Failure to do so can result in E5000 fine and removal of chieftaincy.
- The Kings powers can be delegated to the Minister of Justice

The role of the chiefs in voter registration

- ❖ It is to be absolutely confident that the chief knows the law and can apply it fairly. In doing so it is believed that the Commission is misdirecting you in law. It does not have the power to overturn existing legislation but merely to oversee its correct implementation in light of the current law and the constitution.

Role of the Chief in Election Administration

- ❖ There is a strange clause in section 87 (5) that states that ‘persons are nominated (that is invited to serve) on the basis of being known to the community’ they need ten nominations but it is not clear whether this is enough to ensure a nomination or that it is only a minimum qualification. It is also not clear who does the inviting. It is the chief or is it the process? If it is the chief, what criteria must be used?
- ❖ Has there been guidance on this from the Commission. It is believed that one must use the criteria of independence that was discussed above and so we are prevented from publicly expressing or implying any personal preferences or bias, by word, action, omission or silence. This means that you may have to go against the expressed or implied wishes of some powerful people, family members and friends. That is what independence is.

Canvassing

- ❖ Canvassing is expressly forbidden before the primary elections. This is obviously being widely breached but it is the role of the chief to ensure that activities that could be interpreted as canvassing are properly controlled.

Conduct before Elections

- ❖ There are many rules in the Elections order about the conduct of the nominees and that such activities as buying votes, feeding people excessively, use of muti are all subject to criminal sanctions. It is the role of the chief to enforce these, even against sitting MPs.

Closing remarks

Snelisiwe Ntjangase
Skillshare representative

- ❖ She thanked chiefs for respecting and honoring the invitation. She also apologized for the manner chiefs were invited and she mentioned that it wouldn't happen again since they now know the procedure to approach chiefs.
- ❖ She highlighted that
 - The program is sponsored by USAID and it is now at its last stages.
 - Peer educators have been trained in the different communities and are already working.
 - The objective of the meeting is to teach on the constitution, extract and explain women's rights. The focus is on the Swazi constitution and CEDAW
 - She expressed hope that members of parliament would take the initiative of informing the chiefs on new laws that they have been passed. She expressed her wish that the gap between MPs and chiefs would be bridged.
 - Time is now to start working with women in the traditional structures.

Emmanuel Ndlangamandla
CANGO representative

- ❖ The role of CANGO is to coordinate, train, and engage authorities on social welfare. These include institutions such as the government, COMESA, world bank, etc.
- ❖ Issues of women are at the heart of CANGO. Women are affected from homes, communities, country and worldwide.
- ❖ In her attempt to address women issues the government has established a gender unit to look at the welfare of men and women.
- ❖ Despite that women are affected by HIV/AIDS and in sexual transmitted disease, and poverty, their role remains central to the home and family set-up.
- ❖ The country has ratified agreements like the CEDAW with organizations such as SADC, AU, and UN, to mention a few.
- ❖ As community leaders chiefs should know these laws so that they may give solutions in line with the ratified agreements.
- ❖ The government acts as the board of trustees. We have to view the issue of elections politically. The responsibility of every parliamentarian is to administer and control the country's finances.

Sarah Maurice Parker
US Deputy representative

- ❖ The constitution ensures that all have people have the opportunity to make a living. The promotion and protection of women's rights is one of the vital aspects that have to be tackled and addressed.
- ❖ Since the constitution is the supreme law of Swaziland the country has to develop a culture of human rights.
- ❖ Chiefs have challenges and nobody appreciates the responsibility they have. They have to maintain the respect of all the people. The wisdom of keeping

communities together in peace does not from physical built, but internal power, integrity and self-belief.

- ❖ Chiefs have the mandate to initiate and bring changes. They can use the peer educators in their respective communities to reach out to the people. Also, chiefs have to be exemplary to positively influence their subject's behavior.